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Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Case update: building safety

Triathlon Homes LLP v Stratford Village Development Partnership & Anr

[2025] EWCA Civ 846

We discussed this case in Issue 284. Triathlon brought the proceedings in respect of five residential blocks at the former athletes' village for the London 2012 Olympics at Stratford, now known as East Village. In November 2020, serious fire safety defects were discovered, relating both to the design and the construction of the various cladding systems adopted for the external facades. A programme of work to permanently remedy the defects at East Village by removing and replacing the exterior cladding was implemented. The total cost of the work was said to exceed £24.5 million. Triathlon sought, through section 124 of the Building Safety Act 2022 ("BSA"), a Remediation Contribution Order ("RCO") of some £18 million towards the remediation costs from SVDP, the developer, and its parent company. These costs represented Triathlon's share of the total and included historic costs that had been paid. The First-tier Tribunal ("FTT") agreed that Triathlon was entitled to the RCOs it had sought.

The CA unanimously dismissed the appeals against the RCO noting the *"thorough and careful"* decision of the FTT. The CA agreed that it was *"just and equitable"* for the FTT to have granted the RCO. Nugee LJ noted that the point the FTT were making: *"was that the policy of the Act was to place primary responsibility on the developer"*. The FTT had also said that public funding was: "*a matter of last resort and should not be seen as a primary source of funding where other parties, within the scope of section 124, are available as sources of funding"*. Nugee LJ again said that the FTT were *"justified"* in saying this.

Nugee LJ did note that it would not necessarily always be just and equitable to make RCOs. The appellate judge referred to the situation where a director of a landlord was also a director of other companies which have no other connection with the landlord or its group. Here, such companies might have had nothing to do with the development and be engaged in entirely different businesses or might include a charitable company to which the director had given their time voluntarily.

The CA also confirmed that section 124 of the BSA had retrospective effect. This means that RCOs can be made in respect of remedial costs incurred before the commencement of the BSA. This will potentially provide an avenue for leaseholders/management companies to recover costs they may otherwise not have been able to recover and puts greater accountability on landlords and developers.

Contract interpretation: NHBC insurance

National House Building Council v Peabody Trust

[2025] EWCA Civ 932

The principal issue in this appeal concerned the proper construction of an NHBC insurance policy. The policy provided insurance cover to an employer ("Peabody") when they "*have to pay more*" than they would otherwise have done due to the contractor's insolvency or fraud before practical completion. Here, the contractor became insolvent. The NHBC said that the cause of action under the policy accrued on the insolvency of the contractor in June 2016, and that, in consequence, Peabody's cause of action was statute-barred. Peabody said that the cause of action accrued in 2021, when they were required to pay more to complete the building of the homes due to the insolvency, and that the claim was therefore not statute barred. The first instance judge found against the NHBC's construction. The NHBC appealed.

It is usually the case that the cause of action under an insurance policy accrues on the happening of the event insured against. A claim arises under an insurance policy as soon as the event which directly results in the loss has occurred, and not when the loss is manifested. Of course, everything turns on the precise words of the policy.

Here, there were two relevant criteria which had to be fulfilled before liability under the policy was triggered. The first criterion was that the insured must *"have to pay more"* to complete the building of the homes. In other words, the policy was only engaged "*if you … have to pay more to complete the building of the homes*". The second criterion was that the payment of *"more"* must be due to the insolvency (or fraud) of the contractor. Both criteria must be fulfilled. Coulson LJ noted stressed that the words *"if you … have to pay more"* make it plain that what is being insured against is a particular financial loss and that, without that trigger, there can be no claim.

NHBC's insolvency point concentrated instead solely on the second criterion of insolvency, not the words, *"if you … have to pay more"*.

There were other elements within the policy which supported Peabody's position. The section headed: *"When you can claim"* provided that the NHBC should be contacted *"if … the contractor has not completed the homes(s)"*. This was a notification provision but was also, in the view of Coulson LJ, another indication that the relevant trigger was paying more (or the risk of paying more) because of the non-completion of the homes by the original contractor. This was consistent with Peabody's case that non-completion is inextricably linked to having to pay more to complete the homes.

The policy text under the heading *"What we will do"* stated that the NHBC would pay Peabody "the reasonable extra cost above the contract price … for work necessary to complete the homes". *That again was consistent with the construction*

that a "critical requirement" before a claim can be made concerns the payment out of the *"reasonable extra cost"*, which is necessitated by Peabody having to pay more to complete the homes in the first place.

Coulson LJ also considered Peabody's interpretation to be a commercial one. The NHBC had to argue that the cause of action accrued on the insolvency – at a time when Peabody simply did not know whether the eventual costs would be more or less than the amount, they would have had to pay the replacement contractor. The cause of action would accrue at a time when Peabody may have had no way of knowing whether they would actually suffer a loss at all, much less the extent of that loss. In the view of the appellate judge, that would be *"a very curious outcome"* in circumstances where the policy was designed to protect Peabody against the particular financial loss they suffered, entitling them to rather more than: *"a back-of-an-envelope guess."* Equally, if Peabody were obliged to claim, and the NHBC would have to pay out, on a hypothetical basis when nobody knew whether there had been or would be a loss at all, let alone how much that loss might be.

As a result, the proper construction was that the cause of action accrued if Peabody *"had to pay more"* as a consequence of the insolvency, not at the time of the insolvency.

Adjudication: residential occupiers and pay less notices

RBH Building Contractors Ltd v James & Anor

[2025] EWHC 2005 (TCC)

RBH sought the summary enforcement of a *"smash and grab"* adjudicator's decision in their favour of £665k. Mr and Mrs James said that the contract in question was a construction contract with a residential occupier, so the adjudicator lacked jurisdiction to determine the dispute. They also sought a Part 8 declaration that their pay less notice was valid.

During the adjudication, the Jameses objected to the adjudicator's jurisdiction on the basis that they were residential occupiers. RBH said that the Jameses were property developers, and that they had never occupied it and they never intended to occupy it.

Section 106 of the HGCRA provides as follows:

"(1) This Part does not apply:

a) to a construction contract with a residential occupier (see below) ...

(2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies or intends to occupy as his residence ..."

Deputy Judge Moody KC said that there were two separate and disjunctive grounds where the exception may arise: (i) where a party occupies the property as their residence; or (ii) where they intend to occupy it. Here, Mr and Mrs James had never occupied the house. Indeed, the house was now up for sale, and they accepted that they now had no intention of occupying it. However, their case was that, at the time of the contract and until around November 2022, it had been their intention to occupy it. They stated that their intention changed because their finances were such that they were compelled to put the property up for sale. For the judge, the factual issue which arose on the residential occupier point was: what was their intention, objectively determined, at the time of the contract?

RBH's position was that they had never been informed that Mr and Mrs James intended to occupy the property. This was a development property.

The judge noted that there was evidence, (registering with a local GP, and going on the electoral roll, as well as screenshots of messages with friends) which supported the Jameses' case on their intention at the time of the contract. That evidence, if accepted would be determinative. However, this was an application for summary judgment, and there was conflicting evidence which meant that this issue had to be determined on the basis of oral evidence and could not be resolved summarily. As the judge considered that Mr and Mrs James had a real prospect of establishing that the residential occupier exception in section 106 applied, the application for summary judgment was dismissed.

As for the pay less notice, this was in the form of a letter with 11 bullet points. The letter of 27 November 2024 disputed items with a total value of £1,245,140.55. RBH had claimed a balance due of £663,016.16. The November letter took issue with specified, quantified claims which were in bullet points 1-5, 7 and 9. In the remaining bullet points, the letter rejected certain heads of claim wholesale without referring to figures. The quantified and unquantified heads exceeded £663,000, and so the notice concluded that the sum owing was £0.

The judge considered how the bullet points in the letter which related to the payment application would have been understood by any reasonably objective reader who had knowledge of the contract works. In his view, on that basis, the bullet points set an adequate agenda for an adjudication by identifying specifically which elements of the payment application were not accepted and, briefly, why they were not accepted. The judge did not accept that the letter had to set out an arithmetical calculation in order to amount to a valid pay less notice. That would be to read into the HGCRA an additional requirement that did not appear and would be to take an overly prescriptive approach to the contents of a notice.

The judge referred with approval to the following comment about pay less notices from Sir Peter Coulson at paragraph 3.36 of his book on *Construction Adjudication (4th edition)*:

"The Courts will take a commonsense, practical view of the contents of a pay less notice and will not adopt an unnecessarily restrictive interpretation of such a notice ... It is thought that, provided that the notice makes tolerably clear what is being held and why, the Court will not strive to intervene or endeavour to find reasons that would render such a notice invalid or ineffective."

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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